LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U. S.
FILED
OCT 16 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 45*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS IN NO. 45.

HAROLD E. SPENCER,
ROBERT H. BIERMA,
HARRY E. BOE,
CHARLES CLARK,
FRANK H. COLE, JR.,
LEO P. DAY,
JAMES A. GILLEN,
ROLAND J. LEHMAN,
Y. D. LOTT, JR.,
DAVID O. MATHEWS,
JOHN E. MCCULLOUGH,
TOLL R. WARE,
Counsel for Appellants.

* Together with No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*, No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al., and* No. 48, *Savannah Sugar Refining Corporation, Appellant* v. *United States, et al.*, also on appeals from the same Court.

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	5
Specification of Errors	14
Summary of Argument	15
Argument	23
I. The Commission's Order, Being Based Upon General Expressions of Congressional Policy Rather Than Upon the Substantive Provisions of the Interstate Commerce Act, Is Not a Valid Exercise of the Commission's Power to Prescribe Differentials Under Section 307(d) of the Interstate Commerce Act	23
II. Section 307(d) of the Interstate Commerce Act Is Not a Congressional Mandate for the Prescription of Differentials Between All-Rail and Barge-Rail Rates Regardless of Relative Cost of Service or Other Transportation Circumstances and Conditions	28
A. The Plain Words of Section 307(d) of the Act and the National Transportation Policy and the Legislative History of the Transportation Act of 1940 Clearly Show That the Barge Carriers Are Not to Have Any Rate Advantage Over Other Modes of Transportation to Which They Are Not Entitled by the Economy of Their Service	28

B. The Prescription of Differentials Between All-Rail and Barge-Rail Rates Which Are Not Justified by Economy of the Barge-Rail Service But Which Are for the Purpose of Offsetting the Inferiority of That Service Deprives Appellants of Their Inherent Advantages Contrary to the National Transportation Policy 35

C. The Inland Waterways Corporation Act Does Not Require the Commission to Prescribe Any Differentials Which Cannot Be Justified by Relative Cost of Service or Other Transportation Circumstances and Conditions 41

D. The Commission Cannot Discharge Its Duty Under the Interstate Commerce Act Without Giving Effect to Relative Cost of Service 44

III. The Commission Cannot Establish Joint Barge-Rail Rates Without Finding That Such Rates Will Be Just and Reasonable 50

IV. No Justification for Differentials Can Be Found in the Fact That the Barge Lines Must Necessarily Bear the Burden of Such Differentials 51

V. The Commission's Order Lacks the Requisite Rational Basis and Is Unsupported by Essential Findings of Fact and Substantial Evidence 56

Conclusion 62

Appendix A 63

Appendix B 70

CITATIONS.

Cases.

Alabama Great Southern R. Co. v. United States, 88 F. Supp. 982 ..... 1, 37, 44, 59
All Rail Commodity Rates Between Calif., Oreg., and Wash., 277 I. C. C. 511 40
Ann Arbor R. Co. v. United States, 281 U. S. 658 ..... 17, 25, 26, 28, 29
Application of American B. L. Co., 182 I. C. C. 521 ... 7
Application of Mississippi Valley B. L. Co., 167 I. C. C. 41 7
Atchison Ry. v. United States, 285 U. S. 193 58
Atchison, Topeka & Santa Fe Ry. Co. v. United States, 284 U. S. 248 39
Baltimore & O. R. Co. v. United States, 22 F. Supp. 533 ..... 58, 60
Chicago Junction Case, 264 U. S. 258 ..... 29, 61
Eastern-Central Ass'n. v. United States, 321 U. S. 194 58
Florida v. United States, 282 U. S. 194 58
Inland Waterways Corp. v. Aberdeen & R. R. Co., 183 I. C. C. 761 48
Inland Waterways Corp. v. Alabama G. S. R. Co., 151 I. C. C. 126 ..... 20, 37, 47
Inland Waterways Corp. v. Beaumont, S. L. & W. Ry. Co., 142 I. C. C. 9 46
Inland Waterways Corp. v. Chicago G. W. R. R. Co., 129 I. C. C. 521 46
Inland Waterways Corp. v. Southern Ry. Co., 263 I. C. C. 227 ..... 20, 49

Interstate Commerce Commission v. Mechling, 330 U. S. 567 ..... 18, 30, 35, 36, 37, 38, 41, 52

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282 ..... 19, 42, 43

Morgan v. United States, 298 U. S. 468 58

Naval Stores From Mississippi to Gulf Ports, 235 I. C. C. 723 44

Rail and Barge Joint Rates, 270 I. C. C. 591 ..... 2, 5, 9, 10, 11, 12, 15, 16, 23, 24, 26, 30, 42, 43, 44, 45, 51, 55, 57

Rail and Barge Joint Rates, 274 I. C. C. 229 2

Rubber Products Between Southern and Ohio Points, 41 M. C. C. 93 41

Saginaw Broadcasting Co. v. Federal C. Com., 96 F. 2d 554 (certiorari denied 305 U. S. 613) 58

Securities Commission v. Chenery Corp., 318 U. S. 80. 58

Texas & Pacific Ry. Co. v. United States, 289 U. S. 627 24

Through Routes and Joint Rates, 153 I. C. C. 129 ..... 6, 7, 21, 22, 48

Tri-State Broadcasting Co. v. Federal C. Com., 96 F. Supp. 564 58

U. S. War Department v. A. & S. Ry. Co., 77 I. C. C. 317 ..... 45, 53, 54

U. S. War Department v. A. & S. Ry. Co., 92 I. C. C. 528 ..... 45, 46

United States v. Baltimore & Ohio R. R. Co., 293 U. S. 454 58

United States v. Carolina Carriers Corp., 315 U. S. 475 58

United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499 ..... 58, 59

United States v. Illinois Central R. Co., 291 U. S. 457 . 7, 8
United States v. New York Central R. R., 263 U. S. 603 ..... 18, 25, 27, 28

Statutes.

Hoch-Smith Resolution [43 Stat. 801; 49 U. S. C. § 55] . 25
Inland Waterways Corporation Act, as amended by the Denison Act:
Section 3(c) [45 Stat. 979; 49 U. S. C. § 153(c)] 4, 18, 19, 41, 42, 67
Section 3(e) [45 Stat. 980] 6, 7, 8, 67
Interstate Commerce Act, as amended:
National Transportation Policy [54 Stat. 899; preceding 49 U. S. C. § 1] 2, 3, 14, 17, 18, 19, 28, 30, 31, 35, 36, 40, 41, 43, 50, 63
Section 1 (1) [54 Stat. 474; 49 Stat. 543; 49 U. S. C. § 1(1)] 63
Section 1(4) [54 Stat. 900; 49 U. S. C. § 1(4)] 24, 50, 57, 64
Section 1(5)(a) [41 Stat. 475; 48 Stat. 1102; 54 Stat. 900; 49 U. S. C. § 1(5)(a)] 24, 64
Section 2 [49 U. S. C. § 2] 57
Section 3(1) [54 Stat. 902; 49 U. S. C. § 3(1)] . 24, 57, 64
Section 3(4) [54 Stat. 903; 49 U. S. C. § 3(4)] ... 53, 65
Section 15(1) [41 Stat. 484; 48 Stat. 1102; 49 Stat. 543; 54 Stat. 911; 49 U. S. C. § 15(1)] 65
Section 15a(2) [54 Stat. 912; 49 U. S. C. § 15a(2)] 24, 57, 66
Section 15(7) [49 U. S. C. § 15(7)] 7
Section 307(d) [54 Stat. 937; 49 U. S. C. § 907(d)] 2, 3, 23, 28, 29, 30, 35, 50, 61, 66
Section 320(e) [54 Stat. 950; 49 U. S. C. § 920(e)] . 6, 67

Title 28, United States Code:
Section 1253 [62 Stat. 928] 2
Section 2101 (b) [62 Stat. 928] 2

Transportation Act of 1920:
Section 500 [41 Stat. 499; 49 U. S. C. § 142] ..19, 42, 43

Transportation Act of 1940:
Section 201 [54 Stat. 950; 49 U. S. C. § 920(e)] ... 6

Miscellaneous.

Cong. Rec., Vol. 84:
Pp. 5870-2, ... 70
P. 5873 70
P. 5883 71
P. 5949 71
P. 5958 71
P. 5966 72
P. 6073 .....31, 72
P. 6127 72
P. 6135 72
P. 6149 72
P. 9705 73
P. 9712 .....31, 73
P. 9719 74
P. 9730 74
P. 9746 74
P. 9748 74
P. 9775 75

Cong. Rec., Vol. 86:
P. 5878 75
P. 5881 75
P. 11270 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 45.*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., APPELLANTS IN NO. 45.

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 173-184) is reported at 88 F. Supp. 982.

The report and supplemental report of the Interstate

---

* Together with No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*, No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al.*, and No. 48, *Savannah Sugar Refining Corporation, Appellant* v. *United States, et al.*, also on appeals from the same Court.

Commerce Commission (R. 16-74, 75-77) are reported at 270 I. C. C. 591 and 274 I. C. C. 229.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. Code §§ 1253 and 2101(b), 62 Stat. 928, 962. The final decree of the District Court (R. 189-190) was entered January 12, 1950. The petition for appeal (R. 190-191) was filed and the order allowing appeal (R. 196-197) was entered on March 7, 1950. Probable jurisdiction was noted by this Court on May 15, 1950 (R. 460).

QUESTIONS PRESENTED.

1. Whether § 307(d) of the Interstate Commerce Act is a congressional mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

2. Whether, under the national transportation policy, the Commission may refuse to recognize appellants' inherent advantage of lower cost of service and prescribe differentials in favor of barge-rail service in spite of its finding that it can find no demonstrable economies in such service to justify the differentials.

3. Whether the Commission may deprive appellants of their inherent advantage of superiority of service by establishing differentials based on the inferiority of the barge-rail service.

4. Whether the Commission may establish joint barge-rail rates without finding that such rates are just and reasonable.

STATUTES INVOLVED.

This appeal involves the interpretation of the following statutory provisions:

Section 307(d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907(d)], which reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The national transportation policy, 54 Stat. 899, which precedes section 1 of the Interstate Commerce Act [49 U. S. C. § 1], and which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized

officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3(c) of the Inland Waterways Corporation Act, as amended by section 2 of the Denison Act, 45 Stat. 979 [49 U. S. C. § 153(c)], which reads in part as follows:

> "It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . ."

Other provisions of the Interstate Commerce Act and other statutes are also incidentally involved and are set forth in Appendix A, *infra*, pp. 63-69.

STATEMENT OF THE CASE.

This action was brought in the United States District Court for the Northern District of Illinois by appellants, who are common carriers by railroad, on behalf of themselves and all other common carriers by railroad similarly situated to set aside, annul, suspend, and enjoin an order of the Interstate Commerce Commission entered June 13, 1949, in *Rail and Barge Joint Rates*, No. 26712 on the Commission's docket. The Galveston, Texas, Chamber of Commerce, the Houston, Texas, Port and Traffic Bureau, the Railroad Commission of Texas, and the Savannah Sugar Refining Corporation, of Savannah, Ga., intervened in support of appellants. The Interstate Commerce Commission, Inland Waterways Corporation operating the Federal Barge Lines, Mississippi Valley Barge Line Company, American Barge Line Company, (hereinafter referred to as Federal, Valley, and American), the Baton Rouge, La., Traffic Bureau, the Memphis, Tenn., Freight Bureau, and the New Orleans, La., Traffic and Transportation Bureau intervened in defense of the Commission's order. A specially constituted Court of three judges upheld the validity of the order and dismissed appellants' complaint.

The order in question (R. 14-15) requires substantially all of the railroads in the United States, including appellants, to establish in connection with Federal, Valley, and American, which are common carrier barge lines operating on the Mississippi and Warrior Rivers, their tributaries and connecting waterways, certain through barge-rail routes and to apply over such routes between certain named key points joint barge-rail rates, made by deducting from the all-rail rates between the same points certain fixed differentials prescribed by the Commission and set forth in appendices to its report,* 270 I. C. C. at 622-641 (R. 55-74).

* The port-to-port all-water rates of the barge lines are not involved in this proceeding. This case involves only joint barge-

Pending disposition of this proceeding in the District Court and in this Court, the Commission has from time to time voluntarily postponed the effective date of the order. It is now to become effective on December 31, 1950, on not less than thirty days' notice.

Acting pursuant to the authority conferred on it by section 3(e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980,* the Commission, without a hearing, in 1929, in a proceeding known as Ex Parte No. 96, *Through Routes and Joint Rates,* 153 I. C. C. 129, granted to Federal a certificate of public convenience and necessity and established through routes and joint barge-rail rates between Federal and the rail carriers. It also established differentials between all-rail rates and the barge-rail rates, subject to certain limitations. The Commission devised a formula, commonly referred to as the Ex Parte 96 formula, for the purpose of determining what joint barge-rail rates and what differentials between them and the all-rail rates should be established. The joint rates in effect today are practically all based on this formula. This formula was designed to limit differential joint barge-rail rates to routes which would not be unduly circuitous and over which the barge line's portion of the haul would not be so short that the interchange expense would offset the assumed economies of water transportation. These limitations, which are referred to as the cir-

rail rates governing transportation partly by rail and partly by water and published in a single tariff under proper concurrences of both the water and rail carriers. Barge-rail and rail-barge rates, depending upon which carrier performs the initial service, are called two-way rates. Rail-barge-rail rates, where the water carrier performs only an intermediate service, are called three-way rates. Unless otherwise indicated, the term "barge-rail" as used in this brief includes barge-rail, rail-barge, and rail-barge-rail rates.

* Repealed, effective October 1, 1940, by section 320(e) of the Interstate Commerce Act, which was added by section 201 of the Transportation Act of 1940, 54 Stat. 950 [49 U. S. C. § 920 (e)]. These sections are set forth in Appendix A, *infra*, pp. 67-69.

cuity and relative-service limitations, are set forth in full in 153 I. C. C. at 136-7. Within the permissible limits, joint barge-rail rates were to be determined by deducting from the lowest all-rail rate on the traffic involved from origin to destination an indicated percentage (generally 20 per cent) of the lowest corresponding all-rail rate between the ports between which the shipment is transported by barge.*

Similar action was taken in 1930 in connection with Valley, *Application of Mississippi Valley B. L. Co.*, 167 I. C. C. 41, and in 1932 in connection with American, *Application of American B. L. Co.*, 182 I. C. C. 521. Federal is a corporation and agency of the United States Government, operating under the Secretary of Commerce. Valley and American are privately owned and operated.

In *United States v. Illinois Central R. Co.*, 291 U. S. 457, decided March 5, 1934, this Court upheld the constitutionality of the provision in section 4 of the Inland Waterways Corporation Act, which gave the Commission the right to establish joint rates and differentials without a hearing. The Court, however, pointed out that the United States and the Commission had conceded in brief and argument that they interpreted this section to mean that, if the rail carriers joined in the rates pursuant to the order and asked for a hearing, the Commission would be bound to grant a hearing and suspend the rates for the period provided by section 15(7) of the Interstate Commerce Act. As the Court said, "the position is definitely

* For example, if the all-rail rate on a certain commodity from New Orleans, La., to Centralia, Ill., was $1.50 per 100 pounds and the all-rail rate from New Orleans to Cairo, Ill., was $1.00 per 100 pounds, then, assuming that the indicated differential under the Commission's formula was 20 per cent, the joint barge-rail rate from New Orleans to Centralia, using barge to Cairo, thence rail would be $1.30 per 100 pounds, determined by deducting 20 cents (20 per cent of the all-rail rate between the ports between which the shipment is transported by barge) from the $1.50 all-rail rate from origin to destination.

taken that the order is tentative and the rates prescribed thereby cannot be enforced without a hearing if properly sought by appellees." 291 U. S. at 461.

Most of the joint rates prescribed by the Commission in the proceedings referred to had, however, already been established pursuant to the orders of the Commission. Therefore, on September 7, 1934, the railroads filed with the Commission three formal complaints under section 3(e) of the Inland Waterways Corporation Act, attacking the lawfulness of the through routes, joint rates and differentials which the Commission had prescribed. At the same time, a petition was filed seeking the reopening of various proceedings in which joint rates and differentials had been prescribed. The Commission thereupon, by an order dated October 8, 1934 (R. 78-80), instituted a general investigation, *Rail and Barge Joint Rates*, Docket No. 26712, among other things, into the reasonableness and lawfulness otherwise of existing through routes and joint rates and the reasonableness of existing minimum differentials "with the view to . . . prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require." (R. 80.) Consolidated for disposition with the general investigation were the three formal complaints filed by the railroads and certain other proceedings involving the same general questions.

Hearings before the Commission began March 20, 1935, and were completed March 19, 1943. There was before the Commission a record of 16,440 pages of testimony and 1,475 exhibits.

In view of the nature of the questions raised by this appeal, it is not considered necessary to refer extensively to the evidence before the Commission, and counsel for all parties have entered into a stipulation that the testimony

and exhibits before the Commission should not be printed but that they should stand as part of the record on appeal as original exhibits, to which any party and the Court might refer (R. 458-9). While appellants contend that the Commission's order is unsupported by the evidence before the Commission, appellants do not ask the Court to examine such evidence for the reason that appellants contend that the Commission's report shows on its face that the Commission did not even purport to base its order on the record before it.

It is, therefore, necessary to review only briefly the evidence before the Commission. The most important part of the record before the Commission dealt with cost of service. Referring to this evidence, the Commission said in its report, 270 I. C. C. at 603 (R. 32):

> "*Cost of service.*—Approximately one-fourth of the record deals with cost of transportation service by rail and barge. At the outset of the hearings the railroads announced their intention of showing 'that the cost of transporting freight by barge-and-rail routes is not less than the cost of transporting freight by the all-rail routes, that the fact of the matter is that the all-rail routes are far more economical than the barge-and-rail routes' contrary to the view theretofore widely held and frequently expressed that water transportation, including that performed by the barge lines, is inherently cheaper, as a general proposition, than rail transportation. Federal and Valley accepted the challenge in this assertion."

After describing briefly the cost evidence presented by the parties, the Commission continued, 270 I. C. C. at 604 (R. 33):

> "All of the evidence bearing on cost of service was referred for study to our cost section which was at that time part of our Bureau of Transport Economics and Statistics, hereinafter referred to as the cost section. At a further hearing a 'restatement and

summary of rail and barge cost data' with supporting details was introduced in evidence by members of the staff of the cost section who reached the general conclusion—

> that the cost for the joint rail-barge routing is greater than that for the direct all-rail routing. Important factors contributing to this result are the relatively high cost for barge terminal operations and the added terminal handlings incurred on joint rail-barge traffic."

Evidence in the nature of comment and criticism of the restatement of the cost section was introduced by the parties, and supplemental briefs were filed. Concerning such evidence, the Commission said, 270 I. C. C. at 604 (R. 33):

> "No useful purpose would be served by reviewing these criticisms with a view to making a finding as to relative all-rail and barge-and-rail costs in the period 1933-38, which the cost studies covered. Since then there have been radical changes in the conditions affecting cost of transportation service by barge as well as by rail."

It should be noted, however, that, although the Commission made no finding with respect to the actual relation between all-rail and barge-rail costs during the period which the cost studies covered because of changes in conditions which had occurred since that time, no inference was made by the Commission and none is to be drawn from its report that the relative cost levels had changed in favor of the barge lines during the intervening period. In fact, the Commission refers in its report to testimony of the president of Federal before a subcommittee of the House of Representatives in April, 1947, in which he referred to the effect of the high cost of terminal handling upon merchandise traffic of the barge lines, 270 I. C. C. at 605-6 (R. 34-5). Again, it should be borne in mind that this case involves only traffic handled over joint barge-rail

routes, which must necessarily incur this expensive terminal handling.

The Commission concluded its discussion of the cost evidence before it with the following finding, 270 I. C. C. at 606 (R. 36):

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials."

Considerable testimony was also presented by shippers. This testimony is reviewed in the Commission's report, 270 I. C. C. at 606-9 (R. 36-9), and with respect thereto the Commission observed, p. 609 (R. 39):

> "The shippers' evidence is chiefly of significance because it indicates a fairly unanimous view that the principal object in shipping by barge is to save transportation expense."

There then follows in the Commission's report an entire section entitled, "THE JUSTIFICATION FOR DIFFERENTIALS." This section bears the sub-title, "*Congressional policy*," and is devoted entirely to a discussion of congressional policy with respect to barge-rail transportation in the Mississippi Valley. The Commission referred to the so-called policy of Congress to "afford to the people of a large part of the country the economies of cheaper transportation by water" and to the policy of Congress to continue the services of Federal until "there shall have been published and filed . . . such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers." The Commission concluded, therefore, 270 I. C. C. at 610 (R. 40):

"In the light of legislative history the term 'priv-

ileges of joint rail and water transportation' must be understood as referring to barge-and-rail rates lower than all-rail rates."

The Commision referred, 270 I. C. C. at 611 (R. 41-2), to the arguments of the rail carriers based upon the national transportation policy and stated, p. 611 (R. 42):

> "Urging that no such advantage exists today, so far as the facts before us show, the rail respondents contend that they should now be found to have an inherent advantage even though the necessary consequence of such a finding would be tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley."

The Commission rejected the rail carriers' arguments based on the national transportation policy in the following language, 270 I. C. C. at 611-12 (R. 42-3):

> "We are unable to accept this argument based on the national transportation policy. In the past several years Federal has received continuing consideration by congressional committees on appropriations as well as others. It definitely appears from that consideration that Federal is deemed to be performing a pioneering function for the purpose among others of demonstrating the advantages of joint barge-and-rail transportation in the belief that such service eventually will prove to be economical. It is not for us to say that the experiment should now come to an end."

At no place in its discussion of the justification for differentials does the Commission refer to any of the rate-making provisions of the Interstate Commerce Act, nor is any attempt made to pass upon the reasonableness or lawfulness otherwise of the joint rates and differentials from the standpoint of any transportation circumstances and conditions. The discussion of the justification for differentials was concluded by the Commission with the following ultimate finding, 270 I. C. C. at 613 (R. 44):

"Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

Believing that the Commission had misconstrued the law and its own statutory power, that the reasons assigned by the Commission as justification for imposing differentials on the all-rail routes were not legally sufficient to support its action, and that the Commission's order was not supported by necessary findings and substantial evidence, appellants filed their complaint to set aside and enjoin the Commission's order. It was duly heard by a District Court of three judges as provided by law. On January 12, 1950, the Court entered an opinion, findings of fact, conclusions of law, and a final decree dismissing the complaint. The Court held that the Commission had not misconstrued the law as contended by appellants and that the Commission's order was supported by proper findings and evidence. The case is here on direct appeal from the order of the District Court.

SPECIFICATION OF ERRORS.

Appellants rely upon all the errors assigned in their Assignment of Errors (R. 192-5). The basic errors of the District Court, however, may be summarized as follows:

1. The Court erred in failing to set aside the order of the Commission on the ground that the establishment of differentials in favor of the inferior barge-rail service, without a finding that the service costs less to perform than all-rail service, deprives plaintiffs of their inherent advantages of lower cost of service and superiority of service in violation of the national transportation policy.

2. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's finding that differentials between all-rail rates and joint barge-rail rates are justified is inconsistent with, unsupported by, and contrary to its finding that it could not find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries which, from the standpoint of cost of service, would justify differentials.

3. The Court erred in failing to set aside the order of the Commission on the ground that, where differentials are not justified by transportation circumstances and conditions, the Commission is without power to establish differentials on the theory that they are required by general expressions of congressional policy with respect to water transportation.

4. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's order was based upon a misconstruction of the Interstate Commerce Act and the national transportation policy.

5. The Court erred in failing to set aside the order of

the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are just and reasonable and in the absence of preliminary and subsidiary findings of fact on which such an ultimate finding could rationally be based.

6. The Court erred in failing to set aside the order of the Commission on the ground that no rational basis for the order is shown by the Commission's findings.

7. The Court erred in failing to set aside the order of the Commission on the ground that the order was not supported by substantial evidence.

8. The Court erred in dismissing appellants' complaint.

SUMMARY OF ARGUMENT.

When two modes of transportation are competing for the same traffic, the prescription of a fixed rate differential between them imposes a competitive handicap on the carrier required to maintain the higher rates. This can be justified under the Interstate Commerce Act only if the differential is for the purpose of protecting an inherent advantage of the carrier in whose favor it is made and only if the differential is shown to be reasonable according to transportation standards. Otherwise, the differential is only for the purpose of allowing an inferior service to compete on more nearly equal terms with a superior and more efficient service and such a differential is merely an arbitrary penalty, which the Commission has no power to impose.

After years of hearings, upon a massive record, the Commission made the following finding, 270 I. C. C. at 606 (R. 36):

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials."

While the Commission did not make a finding as to the actual relation of all-rail versus barge-rail costs during the period covered by the cost studies because of changes in both rail and barge costs since that time, in no way does this impair the validity of its finding that there are no demonstrable economies in the barge-rail service which will justify differentials.

The Commission was well aware of the fact that, at least at the time of the hearings, the conclusion of its own cost section was that the all-rail costs were less than the barge-rail costs and that important factors contributing to this result were the high terminal costs of the barge lines and the added terminal handlings required on the joint traffic. 270 I. C. C. at 604 (R. 33). Certainly, the Commission did not infer that the relative cost levels had changed in favor of the barge lines during the intervening period. Indeed, all inferences were to the contrary. The Commission was aware of and mentioned in its report the continuing operating deficits of Federal, 270 I. C. C. at 595-6 (R. 22), and the fact that the privately operated Valley had placed embargoes against the joint traffic "in order to avoid a serious loss of revenue owing to the expense of transferring freight between barges and railroad cars." 270 I. C. C. at 606 (R. 35-6); see also R. 340-1. The Commission also referred to the testimony of Federal's president before a House subcommittee as to how the high cost of terminal handling was affecting both Federal and the private lines. 270 I. C. C. at 605-6 (R. 34-5).

The Commission could see, of course, without mak-

ing a detailed finding as to costs, that there were no economies in the barge-rail service to support differentials. And in the view the Commission took of the matter, it made no difference whether there were such economies or not.

If, therefore, this is a finding that there are no economies in the barge-rail service which will justify differentials, then the prescription of differentials in the face of such a finding deprives appellants of their inherent advantages of lower cost of service and superiority of service in violation of the national transportation policy.

But even if, as appellees contend, this is merely a finding that the Commission can make no finding as to whether there are any demonstrable economies in the barge-rail service which will justify differentials, the Commission's order is equally unlawful for the reason that the Commission has no power to confer on the barge-rail routes an arbitrary rate advantage for which no affirmative justification is disclosed by the Commission's findings. Furthermore, even if the all-rail and barge-rail costs were exactly the same, the prescription of differentials in favor of the barge-rail routes to offset the superiority of the all-rail service would still deprive appellants of their inherent advantage of superiority of service for this, too, is entitled to protection under the national transportation policy.

Even if the Commission had not clearly misconstrued the policy of Congress, the fact that the Commission's order is purportedly based upon general expressions of policy rather than on the transportation standards of the Interstate Commerce Act in itself shows the arbitrary character of the order. This Court has made it clear that the Commission has no authority to base an order on general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *United States* v. *New*

York Central R. R., 263 U. S. 603. Its order must be based on the substantive provisions of the Interstate Commerce Act, and the rates and differentials prescribed must be reasonable and otherwise lawful according to transportation standards. Even the national transportation policy itself, which the Commission ignored, does not give the Commission any arbitrary power to carry out general declarations of policy. It states that all the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out the declaration of policy. Yet at no place in the Commission's report is there any indication that the Commission tested the prescribed rates and differentials by the transportation standards of the Interstate Commerce Act. There is not even a finding that the prescribed rates are just and reasonable or that they would cover the cost of operation of the barge-rail service. There is nothing in the Commission's report to indicate that it had any reason for its decision except a belief that it was carrying out a policy of Congress for the establishment of joint rates and differentials.

But, even so, the Commission clearly misconstrued the plain terms of the Interstate Commerce Act and the policy of Congress in two important respects. It admittedly gave no effect to the national transportation policy which requires it to preserve the inherent advantages of all modes of transportation, rail as well as water, and it erroneously interpreted section 3(c) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 979 [49 U. S. C., § 153(c)], as requiring it to prescribe differentials even though it could find no demonstrable economies in the barge-rail service which would justify them.

Interstate Commerce Commission v. Mechling, 330 U. S. 567, established the principle that the lower cost of op-

eration of the barge carrier there involved was an inherent advantage and that the Commission had no discretion to approve any type of rates which would reduce or take away this inherent advantage. The "fair and impartial regulation" guaranteed by the national transportation policy requires that the same rule be applied to protect the inherent advantages of the rail lines. That such was the intent of Congress is shown beyond doubt by the legislative history of the Transportation Act of 1940.

To be sure, to the extent that the expenditure of enormous sums of the public money for navigable waterways permits barge lines to operate more cheaply than other carriers, such operations are to be protected by the Commission. However, nothing could be clearer from the legislative history of the Transportation Act of 1940 than that in situations where, even with all these advantages, the barge lines cannot compete efficiently and economically with the rail carriers, the inherent advantages of the rail lines are to be recognized and preserved. Congress did not intend that, in addition to direct subsidies, the barge lines should also be indirectly subsidized at the expense of the rail carriers by economically unjustified differentials.

Nor is section 3(c) of the Inland Waterways Corporation Act, as amended, upon which the Commission so heavily relied, any legal basis for the Commission's order. It is nothing more than a general expression of Congressional policy for the establishment of joint rates on terms reasonably fair to both rail and water carriers. It sets up no substantive standards for the establishment of such rates. It does not indicate that any preference is to be given the water carriers. Like section 500 of the Transportation Act of 1920, construed by this Court in *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 288, the most it can mean is that there shall be "impartial recognition and promotion of the interests of all."

The Commission cannot properly discharge its duty under the Act to recognize and preserve the inherent advantages of all modes of transportation without giving effect to evidence of relative cost of service. Throughout the whole history of these differentials, the Commission has always assumed that they were justified by economies in the barge-rail service. In *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, 144, the Commission pointed out that the differentials are based upon the premise that the barge service costs less and is worth less than the rail service. The Commission also said:

> "From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

Federal itself, as late as 1945, insisted that "the prime reason for differential rates is not the disability of the service by water but the lesser cost of operation by water than by rail." *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I. C. C. 227, 234. See R. 41.

If, as appellees contend, it is not necessary to find any economy in the barge-rail service to justify the differentials, what can justify diverting the traffic from the all-rail to the barge-rail routes? Certainly not the inferiority of the barge-rail service for that would deprive the rail carriers of one of their inherent advantages. Nor would the mere willingness of the barge lines—especially one whose losses are borne by the taxpayers—to bear the burden of the differential justify the Commission in preventing a superior, lower-cost service from meeting the competition of an inferior, higher-cost service. What, then, will justify the differentials? That is the question appellees must answer, for the Commission has no right to prescribe differentials and divert the traffic from the all-

rail routes in the absence of affirmative justification therefor.

The findings of the Commission disclose no legal theory upon which the differentials can be justified, nor are there any findings of the basic facts from which the Commission's ultimate finding can be rationally or logically inferred. After excluding economy of the barge-rail service as a justification for these differentials, the Commission pointed to no other evidence which it did regard as such justification. The Commission's order is, therefore, clearly unsupported by essential findings and substantial evidence.

Commissioner Woodlock, in his concurring opinion in *Through Routes and Joint Rates*, 153 I. C. C. 129, 138-9, stated with great clarity the problem confronting the Commission as a result of the Denison Act. In part, he said:

> "It is the intent of Congress, clearly and definitely expressed in the statutes, that water transportation shall be encouraged to the end that the people may derive whatever true economic benefits may inhere therein. It is equally the intent of Congress that our national railroad system shall be preserved in full vigor. There is no necessary economic contradiction between the two intents and both are manifestly 'in the public interest.' Traffic will move by water only when it is more advantageous so to move it than to move it by rail. In general the inducement must take the form of lower rates. The public is entitled to the lowest rates that water-line carriers can offer, and still make a reasonable profit from the traffic. Whatever business is diverted by such rates from the rail lines is properly so diverted. But if both rail and water lines are to be preserved in full vigor, the total traffic must support both. Neither can properly prey upon the other. Water-line owners can not expect rail-line owners to support them, or vice versa.
>
> "In 151 I. C. C. 126 and 151 I. C. C. 91, and in the instant case, we are making a preliminary insertion of the water lines into our national transportation

> system. We are here prescribing joint through rail-water rates over a large part of the United States. We are doing it summarily because Congress told us to do it. We do not know whether the level of the rates prescribed is or is not, in fact, the proper level. We found the differential in existence as a relic of the war and we continue it. It may be too high, or it may be too low; we have not here the evidence on which to determine the question."

He went on to say that with respect to the problems confronting the Commission and the public "it is evidence and not propaganda which is required," 153 I. C. C. at 139. In the case now before the Court, the Commission had the evidence but refused to give any effect to it. It prescribed differentials although it could find no demonstrable economies or "true economic benefits", as Commissioner Woodlock called them, in the barge-rail service which would justify differentials. This it cannot lawfully do.

ARGUMENT.

I.

The Commission's Order, Being Based Upon General Expressions of Congressional Policy Rather Than Upon the Substantive Provisions of the Interstate Commerce Act, Is Not a Valid Exercise of the Commission's Power to Prescribe Differentials Under Section 307(d) of the Interstate Commerce Act.

A mere reading of the section of the Commission's report entitled, "THE JUSTIFICATION FOR DIFFERENTIALS", 270 I. C. C. at 609-13 (R. 39-44), leads to the inescapable conclusion that the Commission did not even purport to test the reasonableness and lawfulness otherwise of the rates and differentials which it prescribed by any substantive provisions of the Interstate Commerce Act. It made no attempt to base its order on the evidence before it. The order is clearly based upon the Commission's interpretation of certain general expressions of congressional policy as a mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

It has already been pointed out, *supra*, pp. 11-12, how the entire section of the Commission's report entitled, "THE JUSTIFICATION FOR DIFFERENTIALS" is devoted to a discussion of congressional policy with respect to water transportation and how the Commission specifically rejected the arguments of the rail carriers based upon the national transportation policy because it considered that recognition of the inherent advantages which appellants claimed would be "tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-

rail rates in the Mississippi Valley." 270 I. C. C. at 611 (R. 42).

There is no discussion of the reasonableness of the rates under sections 1(4) or 1(5) (a) of the Act. There is no discussion of appellants' and interveners' allegations that the rates cause undue preference and prejudice among shippers in violation of section 3(1) of the Act. There is no discussion of the factors which section 15a(2) of the Act requires the Commission to take into consideration in the exercise of its power to prescribe just and reasonable rates. Yet, the power of the Commission to prescribe joint rates is subject to all these sections of the Act. Nor does the Commission point to any evidence before it which it regards as justification for the differentials. It simply regards the policy of Congress as requiring differentials regardless of any transportation circumstances and conditions.

That the Commission made no real attempt to determine whether the differentials were justified by the evidence is conclusively demonstrated by its statement referring to the so-called experiment of joint rates that, 270 I. C. C. at 612 (R. 42-3): "It is not for us to say that the experiment should now come to an end." By its own admission, the evidence before the Commission had no bearing on the result reached.

The Commission clearly misconceived its duty under the Act. It was not the duty of the Commission to determine whether the experiment should or should not come to an end, but it was its duty to determine whether the joint rates and differentials before it were reasonable and otherwise lawful in accordance with recognized transportation standards, for the standards of the Act are transportation standards, not criteria of general welfare. *Texas & Pacific Ry. Co.* v. *Unted States*, 289 U. S. 627, 638. This duty and responsibility the Commission abdicated.

Passing for the moment the fact that the Commission obviously misconstrued and violated rather than carried out the intent of Congress, the mere fact that the Commission rested its order on a general expression of congressional policy in the Inland Waterways Corporation Act rather than on the substantive provisions of the Interstate Commerce Act is in itself an error of law sufficient to vitiate its order.

It is well established by decisions of this Court that orders of the Commission must be based upon the substantive transportation standards of the Interstate Commerce Act rather than upon mere general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. *United States* v. *New York Central R. R.*, 263 U. S. 603. In each of these cases, the Court set aside an order of the Commission which had the same defect as the order here involved.

In the *Ann Arbor* case, this Court had under consideration the so-called Hoch-Smith Resolution, 43 Stat. 801, [49 U. S. C. § 55], which had directed the Interstate Commerce Commission to effect such "lawful changes" in the rate structure as would promote freedom of movement by common carriers of the products of agriculture affected by the existing depression in agriculture at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. The Commission had construed that resolution as making certain changes in the basic law and as justifying certain reductions in rates. The Court set the order aside, saying:

> "The original and supplemental opinions of the commission show quite plainly that the commission based the order entirely upon the joint resolution . . . True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint reso-

lution when construed as the Commission construed it, and not that they were deemed unreasonable under § 1(5) or § 3(1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections, but believed by it to have been brought into the problem by the resolution.

. . . . . .

"The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it.

. . . . . .

"We are of opinion that the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." 281 U. S. at 665-6, 668.

The similarity of the present case to the *Ann Arbor* case is striking. Here, too, the report of the Commission shows quite plainly that the Commission based its order entirely upon a general expression of congressional policy. True, in its report, it said that differentials between barge-rail and all-rail rates were justified, 270 I. C. C. at 613 (R. 44), but its report taken as a whole shows that it deemed the differentials justified because of a general expression of congressional policy when construed as the Commission construed it and not because the differentials were justified as reasonable differentials according to the transportation standards of the rate-making sections of the Interstate Commerce Act. Throughout the report of the Commission, it is manifest that the Commission was testing the validity of the rates and differentials by considerations

which were not applicable under the substantive provisions of the Interstate Commerce Act.

In *United States* v. *New York Central R. R.*, 263 U. S. 603, the Commission had ordered the railroads to issue certain scrip tickets at a 20 per cent reduction from face value, apparently on the ground that this was required by congressional policy. In setting aside the order, this Court said:

> "It is further alleged in the bill that the conclusion stated by the Commission that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel, is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law. This was the view taken by the three judges who sat in the District Court. They held that the Commission considered that the amendment of 1922 either required it to make a reduction, or at least showed a spirit and purpose that should be deferred to, and on that ground came to a result that otherwise would not have been reached. They held that, therefore, the order could not stand, considering that the amendment of 1922 like the rest of the Interstate Commerce Act called for an unbiased opinion upon the merits of the case.
>
> . . . . . .
>
> "After thus excluding the grounds upon which the order could be justified the Commission held that the obvious spirit and apparent purpose of the law required that the experiment should be tried, and on these premises declared that the rates resulting from the reduction of 20 per cent would be 'just and reasonable for this class of travel.' It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand." 263 U. S. at 609-10, 611.

It seems as plain in the case at bar as in the *New York Central* case that the Commission was not prepared to make its order on independent grounds apart from the supposed congressional policy. In fact, it said so in plain language. If its order cannot be supported under the substantive provisions of the Interstate Commerce Act, clearly then, under the doctrine of the *Ann Arbor* and *New York Central* cases, it cannot be supported on the theory that the order is based upon a general expression of congressional policy in the Inland Waterways Corporation Act.

II.

Section 307(d) of the Interstate Commerce Act Is Not a Congressional Mandate for the Prescription of Differentials Between All-Rail and Barge-Rail Rates Regardless of Relative Cost of Service or Other Transportation Circumstances and Conditions.

A. The Plain Words of Section 307(d) of the Act and the National Transportation Policy and the Legislative History of the Transportation Act of 1940 Clearly Show That the Barge Carriers Are Not to Have Any Rate Advantage Over Other Modes of Transportation to Which They Are Not Entitled by the Economy of Their Service.

Section 307(d) of the Act confers on the Commission the power to establish "whenever deemed by it to be necessary or desirable in the public interest, after full hearing," through routes and joint rates between carriers by rail and carriers by water. That section also provides that the Commission "shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates."

The words of the statute are plain in and of themselves. They clearly are not a mandate for the prescription of differentials without regard to cost of service or other transportation circumstances and conditions, nor do they con-

fer on the Commission any arbitrary power to prescribe differentials in the sole discretion of the Commission regardless of the evidence before it. Yet exactly such arbitrary power was arrogated by the Commission when it held that it could prescribe differentials between all-rail and barge-rail rates regardless of the fact that it could find no demonstrable economies in the barge-rail service which would justify the differentials. Interpreted as the Commission interpreted it, and as appellees would have this Court interpret it, there would be a serious question as to the constitutional validity of section 307(d). Cf. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, 669.

But the Act gives the Commission no such power. It requires the differentials to be justified, and it requires them to be reasonable. This obviously means reasonable by transportation standards for the standards of the Act are transportation standards. The Commission is required to decide this case in accordance with the evidence before it. If there is no rational relationship between its findings of fact and its conclusion, its order is arbitrary and void.

Arguments similar to those advanced here by appellees were rejected by this Court in the *Chicago Junction Case*, 264 U. S. 258, 264-5, where the Court said:

> "it is further contended that paragraph 2 of § 5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence. The power here challenged is not of that character. Congress by using the phrase 'whenever the Commission is of the opinion, after hearing,' prescribed quasi-judicial action.* Upon ap-

*In a footnote the Court said: "The same phrase is used in the Interstate Commerce Act in respect to many other classes of orders. These orders, so far as considered by this Court, have uniformly been held to be subject to judicial review; and where an essential finding was unsupported by evidence, the order was declared to be void." (citing cases)

> plication of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

And this Court, in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 574, in referring specifically to section 307(d), said:

> "But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates."

The national transportation policy states that all provisions of the Act are to be administered and enforced with a view to carrying out the declaration of policy. Any lingering doubts, if any there could be, as to the meaning of section 307(d) are set at rest by the national transportation policy. Differentials are justified and reasonable only to the extent that they accord to all modes of transportation "fair and impartial regulation . . . so administered as to recognize and preserve the inherent advantages of each." 54 Stat. 899.

The Commission specifically rejected appellants' arguments based on the national transportation policy because the Commission felt that somehow the recognition of appellants' inherent advantages would be "tantamount to the abrogation of the express policy of Congress with respect to joint barge-and-rail rates in the Mississippi Valley." 270 I. C. C. at 611 (R. 42). The Commission professed to discern such a policy from a general expression of policy in the Inland Waterways Corporation Act.

How the Commission could have reached such a conclusion directly in the face of the clear and explicit language of the national transportation policy is beyond comprehension for nothing could be clearer than the words Congress used in its declaration of the national transportation policy to express its intentions in this respect.

Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, said on the floor of the Senate:

> "... we are stating that it is the policy of the Congress of the United States that the Interstate Commerce Commission shall treat each and every one of these forms of transportation upon an equal basis; and no language could be written into law that more clearly directs that that should be done than we have done in the Interstate Commerce Committee." 84 Cong. Rec. 6073.*

In the House, Congressman Halleck, a member of the Committee on Interstate and Foreign Commerce, said:

> "The object of this legislation is to coordinate and stabilize fundamentally all of the transportation systems of this country and to put them on a fair and equal basis and to preserve the inherent advantages of every type of transportation. You cannot read anything else in it in any line or at any place. This is a matter of equity and of fairness." 84 Cong. Rec. 9712.†

Congress obviously intended that any inherent advantage which any carrier had by reason of its lower operating cost or the superiority of its service should not be taken away or reduced by any arbitrary adjustment of rates. The purposes and intent of the Transportation Act of 1940 in this respect are clear to anyone. Yet, in spite of the clarity of Congress' direction to recognize and preserve the inherent advantages of all modes of transportation, the Commission refused to recognize those of the rail carriers.

* See Appendix B, *infra*, p. 72.

† See Appendix B, *infra*, p. 73.

In its report* on S. 2009, which later became the Transportation Act of 1940, the Senate Committee on Interstate Commerce said (p. 3):

> "Consequently the remaining remedy is to so extend regulation to competing forms of transportation, other than air, which only recently was placed under the Civil Aeronautics Authority, and retaining to each such lawful advantages as are inherent therein, so as to, as nearly as possible, equalize them and put them on a common footing, at least from a regulation standpoint. This is not for the purpose of favoring one form of transportation over another or seeking to put any form of transportation out of business; it is, as stated, simply to put them all on a common basis or common starting point in their sharp struggle for business. S. 2009 seeks to do this also. If one or more forms of transportation cannot survive under equality of regulation, they are not entitled to survive. This is not railroad philosophy; it is transportation philosophy. The problem is not a railroad problem, but is, as the Interstate Commerce Commission has said, a transportation problem."

Likewise, in its report† on S. 2009, the House Committee on Interstate and Foreign Commerce said (p. 3):

> "COORDINATION OF RATES.
>
> "The manifest difference in the economic advantages of transportation by water, highway, and rail makes the question of rate adjustment as between these carriers a practical question. The bill is so drawn as to make it plain that there is no purpose to so adjust rates as to deprive any type of carrier of the inherent advantage of his cheaper cost of carriage.
>
> "A proper coordination of rates requires a proper regard for the advantages of one type over another as manifested in the rate charges."

---

* Senate Report No. 433, 76th Congress, 1st Session.

† House Report No. 1217, 76th Congress, 1st Session.

It is well here to recall something of the background of the Transportation Act of 1940. For some years prior to the enactment of the Transportation Act of 1940, the railroads had experienced exceedingly trying times. Many were in financial difficulties. The President of the United States himself on several occasions had recommended that steps be taken to put the railroads on a firmer financial footing. Various committees were appointed to study the problem. It was widely recognized that, in the interest of a strong, efficient national transportation system, the highly regulated railroads ought not to have to compete with unregulated water carriers. Legislation was introduced in Congress to bring the water carriers under regulation. In general, the established water carriers themselves were in favor of such regulation. The proposed legislation finally culminated in the Transportation Act of 1940. This Act was passed over bitter opposition, yet seldom had proposed legislation had more thorough consideration.

In discussing this measure on the floor of the Senate, Senator Wheeler, chairman of the Senate Committee on Interstate Commerce, said:

> ". . . I venture the assertion that the bill was given more careful and more thorghtful consideration than any other bill which has ever come before the Senate in my time." 86 Cong. Rec. 11270.

Every conceivable safeguard was written into the Act to protect the water carriers. Congress was acutely aware of the hundreds of millions of dollars of public money spent to make the inland waterways navigable. To the extent that the expenditure of such sums made it possible for the water carriers to operate more cheaply than other modes of transportation, Congress intended that such operations should be protected.

But where the expenditure of public money still did

not allow the water carriers to compete economically with other forms of transportation, Congress certainly did not intend that rate differentials should be established in favor of the water carriers. Congress did not immunize them against the competition of a superior, more efficient service. It did not provide that no matter how uneconomical a service might be rendered at the expense of the taxpayers, the barge lines were entitled to differentials simply because they were barge lines. The purpose of the Act was not to force traffic over uneconomical routes but to coordinate competing modes of transportation and, by fair and impartial regulation, to encourage each within the field in which it had inherent economic advantages. The purpose of the differentials provided by Congress was, therefore, to protect existing economic advantages, not to create arbitrary rate advantages.

If this is not sufficiently clear from the words of the Act itself, the legislative history of the Transportation Act of 1940 leaves no doubt about it. Representative excerpts from several congressional debates have been included herein in Appendix B, *infra*, pp. 70-75. There is no question but what Congress meant exactly what it said when it decreed that the inherent advantages of all modes of transportation should be recognized and preserved. It will also be noted that the federal subsidies for the development of water transportation were regarded by Congress as one of the main reasons why the water lines should receive no special rate advantages. Clearly, Congress intended that both the rail and water carriers should operate under the same set of regulatory rules fairly and impartially administered. Congress intended that there should be differentials in favor of barge-rail service only where justified by the economy of the service. It never intended that there should be differentials solely as a matter of law.

B. The Prescription of Differentials Between All-Rail and Barge-Rail Rates Which Are Not Justified by Economy of the Barge-Rail Service But Which Are for the Purpose of Offsetting the Inferiority of That Service Deprives Appellants of Their Inherent Advantages Contrary to the National Transportation Policy.

The decision of this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, makes it clear that, in construing the provisions of the Interstate Commerce Act, the Commission is bound by the provisions of the national transportation policy. The Commission has no discretion to prescribe rates or differentials which will deprive a carrier of its inherent advantages contrary to the national transportation policy. Therefore, any differentials which are not for the purpose of preserving an existing inherent advantage of the barge lines but are for the purpose of creating an arbitrary rate advantage cannot possibly be "justified" as "reasonable" differentials within the meaning of section 307(d) since they deprive the rail carriers of their inherent advantages of lower cost of service and superiority of service. The Commission has no discretion to declare such differentials "justified" or "reasonable" in the absence of evidence proving that they are in fact in accordance with the dictates of the statute.

Appellants understand the holding in the *Mechling* case to be that the conceded lower operating cost of the barge carrier there involved was an inherent advantage which the Commission must recognize and preserve, for Congress has left the Commission no discretionary power to approve any type of rates which would reduce this inherent advantage. In that case, this Court said:

> "It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition." 330 U. S. at 579.

If it is not within the province of the Commission to protect the traffic of the railroads from barge competition, as this Court held in the *Mechling* case, then it certainly is not within the province of the Commission arbitrarily to divert traffic from all-rail to barge-rail routes or to immunize the barge carriers against rail competition when that competition results from the ability of the rail carriers to render a superior service at lower cost. The "fair and impartial regulation" called for by the national transportation policy demands that the rule of the *Mechling* case be applied impartially and that it protect the inherent advantages of the rail carriers to the same extent that it protects those of the barge carriers.

The argument of appellees that the *Mechling* decision compels the Commission to establish differentials in favor of the barge carriers without regard to the economy of the service and the misconstruction of that decision by the District Court in its opinion show that appellees and the District Court do not understand the fundamental factual difference between that case and this. In the *Mechling* case, the Commission had found the rates of the barge carrier to be reasonable, and this determination was accepted by this Court.* The Court also assumed that the rail rates west of Chicago, which were competitive with the barge carrier involved, were "fair and reasonable for the services performed." 330 U. S. at 582. Thus, the reasonableness of the barge rates, the reasonableness of the rail rates which were competitive with the barge rates, and, consequently, the reasonableness of the difference between them were all accepted by the Court as having been established, and the question was whether the rail carriers east of Chicago could charge higher rates for carrying ex-

* See footnote 10, 330 U. S. at 578, where the Court said: "The Commission stated that 'The barge rates yield fair returns to the barge carriers, and, for the purpose of this proceeding may be accepted as reasonable.' 262 I. C. C. 7, 19."

barge grain than for carrying ex-rail or ex-lake grain between the same points.

In the present case, on the contrary, the intrinsic reasonableness of the joint barge-rail rates and the reasonableness of the differentials between them and the all-rail rates are the very facts at issue, for the determination of which the Commission instituted its investigation in *Rail and Barge Joint Rates* (R. 79-80). Furthermore, as will be shown more fully later, *infra*, pp. 51-52, the rail lines ask no more for transporting traffic which moves beyond their lines by water than they ask on traffic which moves beyond their lines by rail. This is another important factual difference between this case and the *Mechling* case. It is not the rail lines with which the barge lines connect which object to these unjustified differentials. It is the rail lines with which the barge lines compete.

In *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, 144, the Commission had said:

> "The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

In referring to this statement of the Commission, the District Court said, 88 F. Supp. at 986 (R. 178):

> "Moreover, it is not at all clear that the lesser cost of the service, which is characterized as 'the important factor,' from the standpoint of public policy, on which rate differentials are based, means lower *operating costs;* rather does it seem more likely that the phrase means lower *costs to the public.*"

The *Mechling* case was cited by the District Court in support of this statement. Obviously, however, the

Mechling case is to the contrary, and the District Court's opinion not only ignores the clear purport of the *Mechling* decision but the specific language of this Court, when it said:

> "Although barge lines were much slower than railroads, they were less expensive to operate and therefore could afford to transport freight much more cheaply than railroads." 330 U. S. at 570.

How could "less expensive to operate" mean anything but lower operating costs? How could it possibly mean lower costs to the public? Obviously, the lower operating costs of the barge line involved in the *Mechling* case were the controlling factor in this Court's decision in that case. What the District Court overlooked was that the lower rates of the barge-rail routes today are not due to any inherent advantage of lower operating costs but are due to orders of the Commission preventing the all-rail routes from meeting the rates of the barge-rail routes. Now that the Commission realizes that the assumption on which these rates and differentials were based was false, the evil ought to be undone.

The suggestion of the District Court that the rail carriers cannot be found to have an inherent advantage because the cost evidence before the Commission was stale is likewise without merit. In the first place, it has already been pointed out, *supra*, pp. 10, 16, that the Commission was dealing with relative cost of service and that there was no reason to think that the relative positions had changed in favor of the barge lines; that, as testified by the Commission's cost expert, important factors contributing to the higher barge-rail costs are the relatively high cost for barge terminal operations and the added terminal handlings incurred on the joint barge-rail traffic; that Federal's president had testified before a House subcommittee as to the high terminal costs of the barge lines; and that

Valley had placed embargoes against the joint traffic to avoid a serious loss of revenue.

But more important is the fact that even if the cost evidence was stale, the validity of appellants' contentions here would in no way be affected by that fact. Suppose, for purposes of argument, that the cost evidence was stale. What right would that give the Commission to impose differentials on the all-rail routes in the absence of affirmative justification therefor? This was a general investigation on the Commission's own motion into the reasonableness and lawfulness otherwise of existing joint rates and differentials with a view to prescribing such joint rates and differentials as the facts and circumstances should appear to require. Surely an order prescribing such rates and differentials requires evidence to support it. If the evidence was stale, then the order is without a rational basis and arbitrary, and the proper procedure would have been for the Commission to assign the proceeding for further hearing to correct any deficiencies in the record which it believed to exist. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248.

It is without legal significance whether the Commission finds that the rail carriers have the advantage of lower cost of service or whether the Commission finds, as it did, that there are no demonstrable economies in the large-rail service to justify differentials. In either case, the prescription of differentials lacks a rational basis and is an arbitrary exercise of the Commission's power. Therefore, in rejecting appellants' arguments based on the national transportation policy, the Commission misconstrued the law. If, in further proceedings before it on a proper interpretation of the Interstate Commerce Act, the Commission feels that the cost evidence should be further brought up to date, it is within its power to so order.

The suggestion of the District Court and appellees that

the cost studies of appellants were deficient because based on "average costs" has no place in this proceeding. Although the cost studies of the railroads were criticized on this ground, the Commission did not pass on this criticism because it declined to make a finding as to the actual relation of barge-rail to all-rail costs during the period covered by the studies. This is a matter for determination, at least in the first instance, by the expert body, the Commission. This question was, therefore, not properly before the District Court on the findings of the Commission. To deal with this question on its merits would require a rather extended argument which would not be pertinent to the issues before this Court. It should, however, be pointed out that the barge-rail traffic involved moved over all parts of appellants' systems and was handled under all types of transportation conditions. Under such circumstances, cost studies based on system averages have been approved by the Commission. *All Rail Commodity Rates Between Calif., Oreg., and Wash.*, 277 I. C. C. 511, 529-30.

The basic issue here is simply whether the Commission can disregard relative fitness and economy and prescribe differentials based solely on the inferiority of the barge-rail service. This it has no power to do. Even if there were no difference at all in the relative operating costs between the barge-rail service and the all-rail service, the Commission would not be justified in imposing a differential on the all-rail rates for to do so clearly deprives the all-rail service of its inherent advantage of superiority of service. It was the obvious intent of Congress to protect such an inherent advantage of a carrier. If the national transportation policy does not mean that a carrier shall not have a differential to compensate for the inferiority of its service, then it means nothing. While the inferiority of the barge-rail service is a factor which the Commission

may take into consideration in fixing the measure of a differential which is justified by the economy of the barge-rail service, the mere inferiority of the service can never be justification for a differential.

This the Commission well knows. In *Rubber Products Between Southern and Ohio Points*, 41 M. C. C. 93, 98, the Commission (Division 2) said:

> "Essentially, the protestants seek an equalization of competition by the imposition of a rate differential on a competing more efficient mode of transportation. Such a request must be denied as inconsistent with the national transporation policy."

The Commission knows the law. It simply refused to follow it because of its interpretation of congressional policy with respect to water transportation. But the plain words of the national transportation policy and the decision of this Court in the *Mechling* case require the Commission to recognize and preserve the inherent advantages of all modes of transportaion, rail as well as water.

C. The Inland Waterways Crporation Act Does Not Require the Commission to Prescribe Any Differentials Which Cannot Be Justified by Relative Cos of Service or Other Transportation Circumstances and Conditns.

The Commission's relince upon section 3(c) of the Inland Waterways Corpration Act, 45 Stat. 979 [49 U. S. C. § 153(c)], as support or its belief that congressional policy requires it to prscribe differentials in favor of barge-rail service without regard to relative fitness and economy is completely unwarranted. That Act provides:

> "It is hereby declard to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall mak generally available the privi-

leges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . ."

With reference to this provision, the Commission commented, 270 I. C. C. at 610 (R. 40):

"In the light of legislative history the term 'privileges of joint rail and water transportation' must be understood as referring to barge-and-rail rates lower than all-rail rates."

There is nothing in section 3(c) of the Inland Waterways Corporation Act which can possibly be construed as the Commission has construed it, as an arbitrary direction to establish differentials in favor of barge-rail transportation. That Act discloses no intent on the part of Congress to give the water carriers an arbitrary advantage over the rail carriers, and it specifically provides that such rates shall be reasonably fair to both rail and water carriers.

This Court has held that provisions similar to this are not to be regarded as a mandate to the Commission to confer arbitrary rate advantages on the barge lines. In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, this Court had under consideration section 500 of the Transportation Act of 1920, 41 Stat. 499 [49 U. S. C. § 142], which declared it to be "the policy of Congress to promote, encourage, and develop water transportation . . . and to foster and preserve in full vigor both rail and water transportation." This Court held, with respect to such declaration of policy:

"The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the

regulatory powers of the Commission, as *e. g.*, in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all." 292 U. S. at 288.

There is nothing in the Inland Waterways Corporation Act which directs the Commission to foster the water carriers to any greater extent than did section 500 of the Transportation Act of 1920. There is nothing which requires other than "impartial recognition and promotion of the interests of all," and there is nothing which is inconsistent with the national transportation policy to recognize and preserve the inherent advantages of each mode of transportation. Even if there were, the latter would govern.

The Commission purports to be carrying out a policy to "afford to the people of a large part of the country the economies of cheaper transportation by water." 270 I. C. C. at 610 (R. 40). Yet it apparently sees no inconsistency in attempting to carry out this policy by conferring an arbitrary rate advantage on a service in which it finds no demonstrable economies which will justify differentials.

The action of the Commission may extend to the people of a large part of the country rates lower than all-rail rates, but it will not be because of the "economies of cheaper transportation by water" or because of any other advantages "inherent" in the barge-rail service. It will be because the Commission, by administrative fiat, is forcing the railroads, the rail shippers, and the general taxpayer to pay part of the transportation costs of the barge-rail service, which should rightfully be borne by the user of the service. There is nothing in the Inland Waterways Corporation Act which requires, justifies, or contemplates such a result.

D. The Commission Cannot Discharge Its Duty Under the Interstate Commerce Act Without Giving Effect to Relative Cost of Service.

"Cost-of-service evidence is essential to determine which form of transportation is economically superior or inferior," said Commissioner Eastman in his concurring opinion in *Naval Stores From Mississippi to Gulf Ports*, 235 I. C. C. 723, 738. Such a statement seems but an obvious truth, yet, in trying to avoid the result which it compels, the Commission practically repudiated all its prior decisions on this subject, and the District Court was led into a dilemma which easily demonstrates the fallacy of its reasoning.

The District Court said, 88 F. Supp. at 987 (R. 178-9):

> "So long as the all-rail rate is greater than the operating costs incurred in the transportation of barge-rail freight, the railroads have no cause to complain that the rate fixed for the inferior service, if fixed somewhere in the region between the barge-rail operating cost and the all-rail rate, is lower than that prescribed for the superior service."

While the Court held that the Commission need not consider relative cost of service, the whole reasoning of the Court rests on the unsupported premise that joint barge-rail rates are fixed somewhere between all-rail rates and barge-rail operating costs. There is, however, no finding in the Commission's report that the barge-rail rates are fixed somewhere between the all-rail rates and the barge-rail operating costs, and, considering the substantial operating deficits incurred by Federal, 270 I. C. C. at 595-6 (R. 22), and the embargoes placed by Valley against the joint traffic, 270 I. C. C. at 606, 613 (R. 35, 44, 340), the Court did not have the slightest basis for indulging in such an unwarranted assumption. On the other hand, the lack of any such finding in the Commission's report is quite significant.

Confronted with the fact that it could find no demonstrable economies in the barge-rail service to justify differentials, the Commission attempted to avoid the force of its earlier decisions dealing with such differentials by stating, with reference to appellants' contention that there must be some economy shown in the barge-rail service to justify the differentials, 270 I. C. C. at 611 (R. 41):

> "This view is reflected in a number of our earlier reports dealing with the question of barge-rail differentials, in which we stressed lower cost of barge service as an important reason for such differentials, but in no instance did we decline to prescribe or approve differential rates because the economy thereof had not been affirmatively shown."

This statement may be technically correct, but an examination of the cases in which the Commission did prescribe differentials shows that the Commission always proceeded upon the assumption that the barge service was sufficiently cheaper than the rail service which it supplanted to justify the prescription of a differential to protect the barge-rail route.

In *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, the Commission dealt with the request of Federal for establishment of through routes and joint rates over practically the entire country. The Commission stated what it believed to be the principles which, in general, ought to guide in the establishment of through routes and joint rates. Among other things, the Commission said:

> "We are not persuaded that further rail-and-barge routes should be established where the degree of circuity would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation." 77 I. C. C. at 362.

In the same case on further hearing, in 92 I. C. C. 528, Federal sought the establishment of additional rail-barge-

rail rates on certain commodities and question was raised as to whether the Commission could prescribe less than reasonable maximum rail-barge-rail rates. The Commission stated:

> "The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points, being both slower and cheaper." 92 I. C. C. at 546.

The Commission concluded, therefore, that, under its power to prescribe joint rates and its power to remove discrimination between connecting lines, it could establish differential joint rates between points between which there was an existing joint all-rail rate in which a rail carrier operating between the ports of interchange participated "provided the differential fairly reflects the lower cost and value of the barge line's service." 92 I. C. C. at 547.

In *Inland Waterways Corp.* v. *Chicago G. W. R. R. Co.*, 129 I. C. C. 521, 531-2, the Commission, in dealing with a request for the establishment of additional joint rates, again referred to its statement in 92 I. C. C. at 546-7 that barge service was slower and cheaper than rail service.

In *Inland Waterways Corp.* v. *Beaumont, S. L. & W. Ry. Co.*, 142 I. C. C. 9, in dealing with a request for the establishment of additional joint routes and rates, the Commission referred to its statement in 129 I. C. C. at 531, where it quoted from 92 I. C. C. at 546-7 to the effect that the barge service was both slower and cheaper than rail service, and held:

> "It is evident that the particular traffic under consideration is such as could be economically handled by the barge line and that the differential under the all-rail rate sought by complainant is reasonable." 142 I. C. C. at 14.

It is important that the Court bear in mind that the case

at bar is not one where the Commission was merely passing on the reasonableness of a voluntarily established rate but that we are here concerned with the power of the Commission to fix a differential between two modes of transportation competing for the same traffic. Cost of service is of far greater significance in this case than in a case where the Commission is simply passing on the reasonableness of a voluntarily established rate.

The distinction is well illustrated by the decision of the Commission in *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, one of the most significant of the Commission's decisions on this subject. In dealing with a request for additional joint routes and rates, the Commission said:

> "It is evident that complainant is under some misapprehension with respect to our duty and authority in establishing new through routes. To permit carriers to maintain for competitive reasons circuitous routes and rates thereover is one thing; but to require them to do so is quite another thing . . . But here we are asked, not to refrain from interfering in what connecting carriers wish voluntarily to do for competitive reasons, but to compel an unwilling rail carrier to join in new barge-rail routes which will compete with existing all-rail routes which are amply capable of handling the business. Plainly if we are to accede to such a request, it should appear that the new routes will be reasonably economical." 151 I. C. C. at 133.

The Commission then said:

> "The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost." 151 I. C. C. at 144.

In Ex Parte No. 96, *Through Routes and Joint Rates*,

153 I. C. C. 129, the Commission devised a formula for the establishment of joint rates subject, however, to the circuity and relative-service limitations to which we have previously referred, *supra*, pp. 6-7. In discussing the proposals of the barge line, the Commission said:

> "Nevertheless, a number of very circuitous routes are included in the proposals as well as a number of instances where the barge haul is relatively so short, as compared with the total barge-rail or rail-barge-rail distance, as to raise grave doubt whether the cost of transportation is not in fact greater over such route than over the direct all-rail route." 153 I. C. C. at 133.

In *Inland Waterways Corp.* v. *Aberdeen & R. R. Co.*, 183 I. C. C. 761, complainant sought the removal of certain restrictions in the rail carriers' tariffs which limited the application of certain proportional rates to traffic moving over all-rail routes. The Commission found that the complainant was subjected to undue disadvantage and prejudice which would be removed by the establishment of joint routes and rates on the basis of the Ex Parte 96 formula. The Commission noted, however:

> "The railroads of the country, considered as in effect parts of one great system of transportation, are in direct competition for traffic with water lines including the Federal barge line. As such competitors, it appears to us that it would be unfair to force them to divert from their rails traffic originated by them to competitive water lines, except in those instances where it can be shown that the services to be performed can be more economically rendered by the water lines than by the rail lines, or where there is some other justification other than a mere desire upon the part of the water lines to divert traffic from the rails for the sole purpose of increasing their tonnage and securing the revenue accruing therefrom." 183 I. C. C. at 765.

Appellees' arguments that costs are only one factor to be considered in passing on the reasonableness of a rate are, therefore, not pertinent here where the Commission was not passing on the reasonableness of a voluntarily established rate. Nor can this case be determined on the basis of rate comparisons and similar data such as are often relied upon by the Commission in passing upon the reasonableness of rates of a single carrier or group of carriers of the same kind. Here, where the Commission is fixing a differential between competing modes of transportation, the determination of relative fitness and economy is essential. For such a determination cost-of-service evidence is necessary.

Throughout the whole history of these differentials, the Commission has been careful to point out that they rested on the assumed lower cost of service of the barge lines. As late as 1945, Federal itself insisted "that the prime reason for differential rates is not the disability of the service by water but the lesser cost of operation by water than by rail . . ." *Inland Waterways Corp.* v. *Southern Ry. Co.*, 263 I. C. C. 227, 234.

Thus it can be seen that while the Commission may never have declined to prescribe differentials because the economy of the barge-rail service had not been affirmatively shown, the Commission was always careful to point out that the differentials rested on the assumed lower costs of the barge-rail service. Since the Commission had evidence of relative cost of service before it in this case, it can no longer indulge in such an unwarranted assumption, but it must, to discharge properly its duty under the Act, give effect to the evidence before it.

III.

The Commission Cannot Establish Joint Barge-Rail Rates Without Finding That Such Rates Will Be Just and Reasonable.

The Commission did not find that the joint barge-rail rates which it prescribed would be just and reasonable rates. Such a finding is indispensable to the validity of the Commission's order. Without such a finding, the order lacks a rational basis. While section 307(d) of the Act does not specifically provide that the rates which the Commission may establish are to be reasonable, this power of the Commission must be exercised in accordance with the other rate-making provisions of the Act and the provisions of the national transportation policy "to encourage the establishment and maintenance of reasonable charges for transportation services, without . . . unfair or destructive competitive practices." Section 1 (4) of the Act specifically requires the joint barge-rail rates to be just and reasonable. Appellants have a right to expect that their competion will be on the basis of just and reasonable rates. Competition on any other basis is an unfair and destructive competitive practice.

The Commission made no attempt to test the reasonableness of the rates by recognized transportation standards. It did not find that the rates which it established would cover cost of operation plus a reasonable profit. In view of Federal's substantial operating deficits and the embargoes placed against this traffic by Valley, appellants submit that, based upon standards usually employed by the Commission for determining the reasonableness of rates, the Commission could not have found that the joint barge-rail rates which it prescribed would be just and reasonable.

Nor is there any merit to the barge lines' suggestion that to fix reasonable differentials is to fix reasonable rates and that the two cannot be legally distinguished. To deduct from existing all-rail rates differentials determined solely on the basis of the lower value of the barge-rail service furnishes no reason at all for assuming that the resulting barge-rail rates will return cost plus a reasonable profit.

Before the Commission is permitted to require the railroads to participate in joint barge-rail rates lower than the corresponding all-rail rates, the Commission should be required to find that the rates which it prescribes will be just and reasonable.

IV.

No Justification for Differentials Can Be Found in the Fact That the Barge Lines Must Necessarily Bear the Burden of Such Differentials.

In its report, the Commission said, 270 I. C. C. at 612 (R. 44):

> ". . . the respondent barge lines reiterate their concurrence in the principle that railroads which are parties to joint barge-and-rail rates are entitled to revenues therefrom equivalent to what they would receive from corresponding all-rail rates. Accordingly, since the barge lines accept the burden of the differential without imposing it in whole or in part on the railroads, they urge that their views as to the measure of the differential are entitled to important weight, as we observed in our first report on this subject, previously quoted, 77 I. C. C. 317, 362."

This argument of the barge lines, however, completely misses the point in controversy. Divisions of the joint rates are not here involved. The rail lines are quite willing to accept the same revenue from a barge-line connection as from a rail-line connection. The railroads ask for no

more revenue on traffic which moves beyond their lines by barge than they ask on traffic which moves beyond by rail, which is another important factual difference between this case and *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567. It is not the rail lines with which the barge lines connect, but those with which they are competitive, which are here complaining. The question here is whether a barge-rail route as a whole shall have an unjustified rate advantage over an all-rail route and thereby divert traffic not from the rail carrier with which the barge line connects, but from the rail carrier with which it competes, although in certain instances, the rail carrier with which the barge line competes may be the same carrier with which it connects.

A simple illustration will make this clear. The Illinois Central Railroad is the short single-line rail route from Centralia, Ill., to New Orleans, La. In addition to moving all the way from Centralia to New Orleans via the Illinois Central, a shipment can also move from Centralia to Cairo, Ill., via Illinois Central and thence by Federal to New Orleans; or it can move to Cairo by Illinois Central and thence via the Gulf, Mobile and Ohio Railroad to New Orleans. For its service from Centralia to Cairo, the Illinois Central is perfectly willing to accept the same division of the through rate from Federal as it accepts from the Gulf, Mobile and Ohio. The complaint of the railroads is that differentials which are not justified by the economy of the barge-rail service impose an unfair and unlawful penalty on the rail haul of the Illinois Central and Gulf, Mobile and Ohio from Cairo to New Orleans and divert traffic from the rail carrier to the barge carrier for that part of the journey. It is the rail haul which is in competition with the barge carrier between Cairo and New Orleans, not the rail haul from Centralia to Cairo, which is hurt by unjustified differentials.

The Commission could not compel the Illinois Central to apply a lower through rate over its joint route with the Gulf, Mobile and Ohio from Centralia to New Orleans than it would permit the Illinois Central to apply over its direct route even though the Gulf, Mobile and Ohio were willing to bear the burden of the differential by accepting a smaller division of the rate. Why, therefore, should the Commission be permitted to compel the Illinois Central to apply a lower through rate in connection with Federal than it will permit the Illinois Central to apply over its direct route unless there is some economy in the barge-rail route to justify diverting the traffic from the Illinois Central by such a differential? And, assuming that the Illinois Central operated only between Centralia and Cairo, why should Federal have an arbitrary rate advantage over the Gulf, Mobile and Ohio? Such an advantage, unless justified by transportation circumstances and conditions, would force the Illinois Central to discriminate between its connections in violation of section 3(4) of the Interstate Commerce Act.

Furthermore, the prior statement of the Commission in *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, 362, to the effect that since the barge line bears the burden of the differential, it may be given considerable latitude in fixing its amount, had a far different meaning in the context in which it was made from that attributed to it by the Commission's report in this proceeding.

In the *U. S. War Department* case, Federal had asked the Commission to establish a large number of joint barge-rail routes. The Commission found that the evidence would not permit it to undertake such a task; instead, it confined itself to indicating its "conclusions as to the general principles which ought to guide in determining what further through routes and joint rates, if any, ought to be established." 77 I. C. C. at 362.

The general principles there enunciated by the Commission made it quite clear that the Commission did not expect any joint barge-rail route to be established where the cost via that route was not less than the cost via the all-rail route. When the cost was less, then the barge line, since it had to bear the burden of the differential, might be given considerable latitude in fixing its amount. In other words, where the differential was justified by the lower cost of service of the barge-rail route, then the barge line's views as to the measure of the differential were entitled to important weight. But there is not the slightest hint in that case that differentials were to be justified merely because the barge line had to bear them.

The mere fact that the Commission, in the *War Department* case, said that it was not persuaded that further rail-barge routes should be established "where the degree of circuity would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation" completely disposes of the notion that differentials can be justified simply by the fact that the burden of the differentials must be borne by the barge lines.

In view of the importance attached to this argument by the barge lines and the completely erroneous significance attributed to the Commission's statement in the *U. S. War Department* case when lifted out of context, we quote a portion of the general principles stated by the Commission in its report in that proceeding, 77 I. C. C. at 362:

> "1. We are left in doubt by the record as to whether further rail-barge-and-rail routes are in the public interest. It may be that they are desirable in certain cases, but we feel that the barge line has not sustained the burden of proof in this respect.
>
> "2. We are not persuaded that further rail-and-barge routes should be established where the degree of circuity would be excessive, nor where the barge

line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation . . .

"3. The record leads to the conclusion that there are additional rail-and-barge routes which would not be open to the objections mentioned above and which ought to be established. It further indicates, however, that if such additional routes are established it will probably be necessary for the barge-line management to modify in some respects its plan of differential joint rates. So long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount; and under the principles which we have outlined for the fixing of divisions, the burden of the differential would, in our opinion, be borne by the barge line. . . ."

As the Commission itself said, principle 3 applies only in the case of routes which would not be open to the objections stated in principle 2. The principle that, since the barge line bears the burden of the differential, it may be given considerable latitude in fixing the amount, therefore, applies only in connection with routes which can themselves be justified by lower cost of service. So interpreted, the principle is perfectly valid. Within the limits within which the differentials are justified by economy of the barge-rail service it is proper to give considerable weight to the views of the barge lines as to the measure of the differential under which they wish to operate. But it was never intended that the willingness of the barge lines to bear the burden of the differentials would, in itself, be justification for such differentials. If that were true, there could never be any reason for denying the establishment of any differentials the barge lines desired.

The Commission must obviously have recognized the fallacy of such reasoning, for it remarked, 270 I. C. C. at 612-13 (R. 44):

> "The requirement that the barge line absorb the differential in its division of the joint rate in and of itself provides some measure of safeguard against the performance of uneconomical barge-and-rail service where the barge line is privately operated, as shown by Valley's recent embargoes of joint traffic interchanged with the railroads."

The Commission, however, well knows that it is Federal against whom appellants need protection. The fact that Federal bears the burden of the differential has been no safeguard at all against the performance of uneconomical barge-rail service since Federal's losses are borne by the taxpayers. This is the very reason why the Commission should not prescribe differentials without economic justification for them and why in the past the Commission has always adopted general principles or formulas to confine the differentials to routes over which it was assumed they would be justified.

Since they must bear the burden of the differentials, the barge lines' views as to their measure are, of course, proper factors to be taken into consideration in fixing the amount of differentials which are justified by lower costs of service, but acceptance of the burden of the differentials can never in and of itself be regarded as justification for them.

V.

The Commission's Order Lacks the Requisite Rational Basis and Is Unsupported by Essential Findings of Fact and Substantial Evidence.

When the Commission abandons transportation circumstances and conditions as its guide for determining the reasonableness and lawfulness of rates and attempts to adjust rates with regard to considerations extraneous to the transportation standards of the Interstate Commerce

Act, the result is necessarily an arbitrary exercise of the Commission's power.

Commissioner Miller, the author of the Commission's report, in a separate statement on his own behalf frankly stated, 270 I. C. C. at 620 (R. 53):

> "The differentials approved by this report are, in the final analysis, based largely on judgment and are necessarily more or less arbitrary."

But why should the differentials approved by the report be "more or less arbitrary"? And why should they be any more "based largely on judgment" than any of the other rates which come before the Commission for determination of their lawfulness?

The Commission has recognized transportation standards provided by the Interstate Commerce Act for determining whether rates and differentials are lawful. It has section 1(4), which provides that the joint barge-rail rates shall be just and reasonable. It has sections 2 and 3(1), which provide that there shall be no discrimination or undue preference and prejudice in rates. It has section 15a (2), which provides a number of factors which the Commission shall take into consideration in the exercise of its power to prescribe just and reasonable rates. Yet, the Commission apparently considered none of these and did not even purport to test the lawfulness of the rates involved under any of these sections of the Act.

It has already been pointed out that the findings of the Commission disclose no legal theory upon which the differentials can be justified. Appellees, therefore, attempt to obscure the lack of any legal basis for the Commission's order by falling back on the usual defense of expertise and administrative finality. But expertise is supposed to be a rational process, and the Commission is under the legal obligation of making clear the process of its reasoning.

It is now too well settled to permit of argument that an order of an administrative agency must be supported by findings of the basic or essential facts which represent the determination of the agency as to the meaning of the evidence and which serve as the basis for findings of ultimate facts or conclusions. *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 211-12. *Securities Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-5. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 488-9. *Morgan* v. *United States*, 298 U. S. 468, 480. *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-2. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504-5, 506, 510-11. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 463, 464. *Florida* v. *United States*, 282 U. S. 194, 215. *Saginaw Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 554, 559, 560, 561 (C. A. D. C.), certiorari denied 305 U. S. 613. *Tri-State Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 564, 566 (C. A. D. D.). *Baltimore & O. R. Co.* v. *United States*, 22 F. Supp. 533, 536-7 (N. D. N. Y.).

This is not a mere technical requirement. It is an essential part of the administrative process. Proper findings are necessary to enable a reviewing court to determine whether the Commission decided the case in accordance with the evidence and the applicable law. The findings need not be in formal style, but they must make clear "with a fair degree of assurance, why the Commission acts as it does." *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 212. It is essential that the findings include "the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred." *Saginaw Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 554, 560.

The Commission cannot pick ultimate findings out of the air. They must naturally flow from findings of the basic facts. As was said in *Tri-State Broadcasting Co.* v. *Federal C. Com.*, 96 F. 2d 564, 567, there must be

> "... some rational or coherent relationship between the basic facts and the ultimate facts, that the latter shall flow logically from the former. It was not the will of Congress as expressed in the statute that orders should be based upon ultimate facts which bear no rational relationship to the basic facts shown by the evidence."

Here there are no findings of the basic facts from which the Commission's ultimate finding that differentials are justified can be rationally inferred. Certainly the Commission's conclusion that differentials are justified cannot be rationally inferred from its finding that it could find no demonstrable economies in the barge-rail service which would justify differentials

The District Court could see nothing wrong in the Commission's findings, saying, 88 F. Supp. at 989 (R. 182):

> "... the Commission's conclusions, worded in the language of the statute authorizing the Commission to enter the order, seem to us to comprise the 'quasi-jurisdictional' findings which the Supreme Court has declared essential."

Such a holding is clearly not in accord with the decisions of this Court. The proper rule was stated by the Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506, as follows:

> "The statement ... that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated."

Here, too, the Commission's conclusion that the differentials are justified and reasonable is not supported by facts more particularly stated.

The decisions of this Court with respect to what findings are necessary to support an order of an administrative

agency were reviewed in an excellent opinion in *Baltimore & O. R. Co.* v. *United States,* 22 F. Supp. 533, 536-7, by Judge Learned Hand, who said, in speaking for a District Court of three judges:

> "We do not think that the bare finding can be made to do so much duty. The purpose of findings in such cases is to enable the courts to discharge their proper function, which is to make sure that the Commission in the discharge of its highly specialized and technical duties, has followed the statute. We have no competence to review their conclusions upon questions of rate making, so far as they involve matters peculiar to transportation; it is to the last degree desirable that we should not concern ourselves with them, as the Supreme Court has said again and again; and we cannot so confine ourselves, when the findings are equivocal. It is true that a finding in the ordinary case that a rate is reasonable may conceal interpretations of law which it will be hard to detect, but there must be some compromise as to the statement of details. That does not excuse the absence here of some statement as to the other constitutive facts necessary before a 'reasonable' rate can be disregarded and a lower one substituted. . . . The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in *Florida* v. *United States,* 292 U. S. 1, 54 S. Ct. 603, 78 L. Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. 'Jurisdiction' is a treacherous word; we are not clear that the Commission's jurisdiction is not involved; but in any event in *United States* v. *Baltimore & Ohio R. R.,* 293 U. S. 454, 464, 55 S. Ct. 268, 272, 79 L. Ed. 587, it was expanded to 'quasi-jurisdictional,' which was meant to cover all 'indispensable' facts; and in *United States* v. *Chicago, Milwaukee, St. Paul & P. R. Co.,* 294 U. S. 499, 504, 55 S. Ct. 462, 464, 79 L. Ed. 1023, the phrase 'basic or quasi-jurisdictional facts' was substituted,

as in *Morgan* v. *United States*, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside."

As Judge Hand so well points out, what findings are basic is a practical matter, but certainly there should be such findings as will enable the Court to ascertain on what legal theory the Commission proceeded. If the Commission proceeded in this case on any legal theory other than that differentials were required by congressional policy, its findings fail to disclose such a fact.

The ruling of the District Court that the Commission need only state its conclusion in the language of the statute is merely the same argument in another form (discussed *supra*, pp. 28-30) that the power conferred on the Commission by section 307(d) is purely discretionary. But section 307(d), as has been shown, confers no such power. Congress has provided that the Commission may act only after full hearing, and that implies that the Commission will receive evidence and decide the case in accordance with the evidence. *Chicago Junction Case*, 264 U. S. 258, 264-5.

Nor can it be said that there must be some evidence in a record of more than 16,000 pages and nearly 1500 exhibits which will support the order. When the Commission specifically excludes any demonstrable economies in the barge-rail service as justification for the differentials and fails to point to any evidence which it does regard as justification for the differentials, the order is clearly not supported by substantial evidence.

It necessarily follows that the Commission's order is not supported by essential findings or substantial evi-

dence, and that there is no rational basis for the order. The Commission clearly did not act in accordance with the pertinent provisions of the Interstate Commerce Act but acted under a misconstruction and misinterpretation of the law and of its own statutory power. It has exceeded its authority, and its action is arbitrary, unlawful, and void.

CONCLUSION.

The judgment of the District Court should be reversed and the cause remanded to that Court with directions to set aside the order of the Interstate Commerce Commission and remand the case to that Commission for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

HAROLD E. SPENCER,
ROBERT H. BIERMA,
HARRY E. BOE,
CHARLES CLARK,
FRANK H. COLE, JR.,
LEO P. DAY,
JAMES A. GILLEN,
ROLAND J. LEHMAN,
Y. D. LOTT, JR.,
DAVID O. MATHEWS,
JOHN E. MCCULLOUGH,
TOLL R. WARE,
Counsel for Appellants.

135 East Eleventh Place,
Chicago 5, Illinois.

APPENDIX A.

Interstate Commerce Act, As Amended:

NATIONAL TRANSPORTATION POLICY.

[54 Stat. 899; preceding 49 U. S. C. § 1.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

SEC. 1(1) [41 Stat. 474; 49 Stat. 543; 49 U. S. C. § 1(1).] That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; . . .

* * * * *

Sec. 1(4) [54 Stat. 900; 49 U. S. C. § 1(4).] It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * *

Sec. 1(5)(a) [41 Stat. 475; 48 Stat. 1102; 54 Stat. 900; 49 U. S. C. § 1(5)(a).] All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Sec. 3(1) [54 Stat. 902; 49 U. S. C. § 3(1).] It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular de-

scription of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * *

Sec. 3(4) [54 Stat. 903; 49 U. S. C. § 3(4).] All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic, between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

* * * * * *

Sec. 15(1) [41 Stat. 484; 48 Stat. 1102; 49 Stat. 543; 54 Stat. 911; 49 U. S. C. § 15 (1).] That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions

of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum or maximum and minimum to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

Sec. 15a(2) [54 Stat. 912; 49 U. S. C. § 15a(2).] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

* * * * *

Sec. 307(d) [54 Stat. 937; 49 U. S. C. § 907(d).] The Commission may and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions

of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . .

* * * * *

Sec. 320(e) [54 Stat. 950; 49 U. S. C. § 920(e).] Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (U. S. C., title 49, sec. 153(e)), is hereby repealed as of October 1, 1940; *Provided, however,* That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of such subsection (e) shall continue in effect as though issued under the provisions of section 309 of the Interstate Commerce Act, as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such subsection (e) shall, after the repeal of such subsection (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended.

* * * * *

Inland Waterways Corporation Act, As Amended:

Sec. 3(c) [45 Stat. 979; 49 U. S. C. § 153(c).] It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . .

* * * * *

Sec. 3(e) [45 Stat. 980.] [Repealed, effective October 1, 1940, by sec. 320(e) of the Interstate Commerce Act.] Any person, firm, or corporation, includ-

ing the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates

ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible. . . .

* * * * *

APPENDIX B.

Excerpts from congressional debates on S. 2009 (Transportation Act of 1940), referred to herein, *supra*, p. 34:

In the Senate.

"[MR. WHEELER.] All we seek to do by the pending bill is to regulate all forms of transportation in exactly the same way—water carriers, railroads, and busses and trucks.

. . . . . .

We have taken a billion and a half dollars out of the Treasury of the United States to be used to widen and deepen those river channels. Who has paid the taxes to provide that money? All the people of the United States, including the railroads of the country, have paid those taxes. They have helped to pay for the widening and deepening of those channels with their own money. In view of the fact that the Government furnishes the water carriers with the means to carry on their transportation, they should at least submit to having their rates regulated upon a fair basis with their competitors. I challenge anyone to say that that is not fair and just.

. . . . . .

". . . . but the Congress of the United States has announced its policy; and all we are seeking to do by this proposed legislation is to say that the competitors in the various fields of transportation, particularly water carriers, inasmuch as we take millions of dollars out of the Treasury every year to improve the waterways so that the water carriers may operate upon them and the railroads pay a part of that cost, ought to be regulated in the same manner and under the same circumstances as the other forms of competing transportation are regulated." 84 Cong. Rec. 5870-2, 5873.

• • • • • •

"MR. AUSTIN. So, if there is one type of common carrier which has a natural facility or a natural advantage over another, the bill does not require, indeed, I understand it not to permit, the extinguishment of the natural advantage in competition for the benefit of the competitor which has not the advantage. Am I correct in that interpretation?

"MR. WHEELER. The senator is entirely correct, and I thank him for his statement. In the rate-making provision, and in three different places in the bill, we wrote in such a provision specifically so as to protect them." 84 Cong. Rec. 5883.

* * * * *

"[MR. WHEELER.] No one has gone into the abuses of the railroads and fought the abuses of the railroads to the extent the Committee on Interstate Commerce has done. We have investigated them and shown them up as has not been done in years by the Congress of the United States; but I would not be fair to myself and I would not be fair to the general public if I did not say that, notwithstanding the abuses that have been going on, the railroads are entitled to a square deal; they are entitled to have their competitors regulated not so as to enable them to raise their rates to give them business, but so that their competitors may not put into effect out-of-pocket rates—rates upon which they lose money simply for the purpose of breaking down the railroad rates." 84 Cong. Rec. 5949.

* * * * *

"MR. TRUMAN. . . . The railroads are absolutely essential to the welfare of the country, and they should not be discriminated against any more than any other method of transportation should be discriminated against. The object of the pending bill is to try to put all methods of transportation on an equal basis. If it will not do that we shall have failed in our effort." 84 Cong. Rec. 5958.

* * * * *

"[MR. NORRIS.] . . . The water carriers certainly have no moral right, as I see the matter, to say to

the railroads, 'You must be regulated, but we must not be regulated'; in other words, giving them an opportunity to do just what the railroads did a few years ago. It would be just as bad if the water carriers people did it as though the railroads did it." 84 Cong. Rec. 5966.

* * * * *

"[MR. WHEELER.] I say to the Senator, as I said a moment ago, that when this legislation is enacted it will be found to be beneficial, because we are stating that it is the policy of the Congress of the United States that the Interstate Commerce Commission shall treat each and every one of these forms of transportation upon an equal basis; and no language could be written into law that more clearly directs that that should be done than we have done in the Interstate Commerce Committee." 84 Cong. Rec. 6073.

* * * * *

"[MR. WHEELER.] When the bill speaks of inherent advantages of the shipping interests, it refers to carriers which can transport at a cheaper rate because they can ship by water, by way of canals and the ocean, so they have natural advantages, and they do not have the expense of the upkeep of the rights-of-way, as the railroads do.

. . . . .

"The bill seeks to give equality to the railroads in the same respect in which we give equality to everybody else.

. . . . .

"When I say 'the same basis' I do not mean to apply the same rates but recognizing the inherent advantages of water transportation, the inherent advantages of bus and truck transportation, and the inherent advantages of railroad transportation. If we desire a unified transportation system, that is what we have got to do; and if we do not want such a transportation system, then let us repeal the law providing for the regulation of railroads, and turn them free." 84 Cong. Rec. 6127, 6135, 6149.

In the House of Representatives.

"[MR. LEA.] Now, what is the situation about this subsidization? What is the transportation problem of the United States? How are we going to avoid Government ownership? Government ownership is just a form of subsidization. It does not help solve our problem. It lifts the burden from one place and places it more firmly upon the backs of the taxpayers of the United States. Do we not all recognize it is very difficult for a private industry to compete with a Government-financed industry that has no capital account to contend with? That is what we have in this present situation. I am not complaining about that, but I do say that these transportation agencies by water, that have been so helped by the Federal Government, ought not come here and object to submitting to that form of regulation, just and fair, that the Federal Government gives to the other transportation agencies of the country with which they compete." 84 Cong. Rec. 9705.

* * * * *

"MR. HALLECK. The object of this legislation is to coordinate and stabilize fundamentally all of the transportation systems of this country and to put them on a fair and equal basis and to preserve the inherent advantages of every type of transportation. You cannot read anything else in it in any line or at any place. This is a matter of equity and of fairness." 84 Cong. Rec. 9712.

* * * * *

"[MR. MARTIN.] I know that the very able and competent chairman of the Committee on Interstate Commerce, the subcommittee, and the committee as a whole have labored to preserve each agency of transportation embraced in the bill in the field best adapted to its particular mode of transportation and to deal fairly with each of them, to the end that each may make its proper contribution to the transportation needs of the country, and on a basis of 'live and let

live.' I believe this legislation is a more than fair beginning toward that end." 84 Cong. Rec. 9719.

• • • • •

"[MR. PEARSON.] This bill is so drawn that even a casual reading will show that there is no purpose or intention to adjust rates in such manner as to deprive any carrier of the inherent advantage of its cheaper carrying costs. A coordination of rates must of necessity take into consideration and regard the advantage of one type of transportation over another, and this bill in its declaration of policy, made a part of the basic act, states that the purpose is 'to provide for fair and impartial regulations of all modes of transportation . . . so administered as to recognize and preserve the inherent advantages of each.'" 84 Cong. Rec. 9730.

• • • • •

"[MR. VAN ZANDT.] That is so clear that he who runs may not only read but also may comprehend. It is the sound principle of 'equal rights for all and special privileges for none' strictly applied to our transportation system by water, highway, and rail, as well as other means. There can be no two ways to interpret this explicit policy. There can be no escape from it by any special pleading on the part of the water lines. They must yield to the logic of the statement and to the force of its application.

. . . . .

"Certainly none of the agencies can be granted special favors in any square deal for transportation, and the main object of this bill is to place all common carriers on an equality in matters of regulation. That equality is what the railroads need most to enable them to continue to give the American public the best transportation service ever furnished at the lowest true cost." 84 Cong. Rec. 9746, 9748.

• • • • •

"[MR. CROSSER.] Nor must it be assumed, for a single moment, that regulating the different kinds of transportation agencies requires the fixing of the

same rates for each of the transportation agencies. Applying the same principles to the different kinds of transportation agencies in the matter of rate-making might, and very likely would result in entirely different rates from the standpoint of dollars and cents. That being true, we will find each agency of transportation carrying the particular traffic to which it might be naturally adapted. This is as it should be in any comprehensive system of regulation." 84 Cong. Rec. 9775.

* * * * * *

"[MR. WOLVERTON.] There has been no desire on the part of the conferees to advance one method of transportation above another. On the contrary, we have constantly sought to insure to each type of transportation the preservation of the inherent advantages of each. The objective in all our deliberations has been to provide a system that in principal and detail would operate in the public interest.

* * * * * *

"It is only fair that the portion now remaining unregulated—inland waterways—should also be brought under regulations, thus providing a complete and unified national system of transportation without favor to one mode of transportation above another but preserving to each the inherent advantages of each." 86 Cong. Rec. 5878, 5881.